IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner, v. JOHN J. WATTS.	No. 184
GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner, v. HUGH C. SICARD.	No. 185
GUY T. HELVERING, Commissioner of Internal Revenue, Petitioner, v. PARKER SLOANE.	No. 186

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

May It Please The Court:

EDWARD H. GREEN, as attorney at law for WESTERN POWER CORPORATION, asking leave to file a brief herein as *amicus curiae,* respectfully shows the Court:

When this cause was argued in the lower Court, the Circuit Court of Appeals for the second Circuit permitted deponent to file a brief in that Court as *amicus curiae.*

Both the Solicitor General, on behalf of the petitioner, and counsel for the respondents have stated to deponent that they have no objection to his filing a brief *amicus curiae,* and have authorized deponent so to advise this Court.

Deponent is the attorney for Western Power Corporation, which now has pending undetermined in the Board of Tax Appeals a case which involves the same question as is presented in the above entitled causes and in which the Government is claiming a deficiency in taxes running into millions of dollars. Accordingly, Western Power Corporation has a vital interest in the presentation and decision of these causes.

WHEREFORE, deponent moves the Court for leave to file, as *amicus curiae,* the brief hereto annexed.

EDWARD H. GREEN,
Attorney for Western
Power Corporation.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

EDWARD H. GREEN being duly sworn deposes and says that the facts and matters stated in the foregoing motion are true and correct.

EDWARD H. GREEN

Subscribed and sworn to before me,
this 12th day of November, 1935.

JOHN W. P. SLOBADIN
Notary Public,
New York County, New York.

BRIEF AMICUS CURIAE

Statement and Question

The relevant facts in the case were fully summarized by the Court below in one sentence:

> "The controlling facts may be stated in one sentence. The petitioners (respondents in this Court) exchanged all of the stock of Alloys solely for stock in Vanadium and bonds of Alloys."

The issue is whether or not this constituted a non-taxable reorganization under the provisions of Section 203(h) of the Revenue Act of 1924. This does not mean an exemption from taxation, but a postponement of the determination of taxable profit or deductible loss until a subsequent disposition of the securities received in the transaction. The Circuit Court of Appeals for the Second Circuit (reversing a divided Board) unanimously held it to be a non-taxable reorganization, and denied a rehearing.

The Board decided against reorganization because Alloys (the company whose stock was acquired by Vanadium) was not dissolved, and this the Circuit Court of Appeals held to be error. The question is thus sharply presented whether dissolution is necessary to constitute a non-taxable reorganization where one corporation acquires all the stock of another corporation in consideration of the issuance of its common stock. There is absent from the case any problem that might have arisen where the consideration given consisted only of short-term notes or bonds or nonvoting preferred stock or of any other type of obligation or security other than common stock.*

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*The fact that bonds were given in addition to common stock would not deprive the whole transaction of its nontaxable character, for at worst it would merely constitute "other consideration" taxable under Subdivision (d) of Section 203. See footnote on page 16, *infra*.

Summary of Argument

Shortly after the enactment of the Revenue Act of 1921, the Treasury Department promulgated Regulations thereunder in which the reorganization section was expressly interpreted so as to provide that the transaction now before the Court constituted a nontaxable reorganization.

Thereafter, Congress reenacted Revenue Acts four times (in 1924, 1926, 1928 and 1932), and in each of them reenacted the pertinent reorganization provisions of the 1921 Act without substantial change.

Furthermore, after each reenactment of the statute the Treasury Department promulgated its Regulations without material change on this question.

The suggestion that this transaction was a taxable reorganization was raised for the first time in 1933, after twelve years of consistent construction and application to the contrary and during which period there were four reenactments of the statute by Congress.

In addition, as we shall point out, there is direct proof that Congress in 1924 examined the administrative construction of the 1921 Act and meant to approve it in adopting the 1924 Act. Also the Revenue Act of 1934 was enacted after this controversy arose, and Congress still made no change in the provisions relevant to the question of dissolution here at issue.

Therefore, there is here presented a perfect case for the application of the rule that reenactment by Congress without material change gives the Treasury Regulation the force of law. In substantiation, there follows, with the requisite detail, the legislative and administrative history of the pertinent provisions of the Revenue Acts.

However, the Commissioner also urges now that his Regulations must be disregarded because they conflict with the statute. A mere reading of the wording of the statute is sufficient to negative this contention, but a study of the legislative history of the statute will make clear beyond question that the Commissioner's Regulations on the point here at issue are correct and exactly in accordance with the intentions of Congress.

History of the Reorganization Section and the Regulations Construing It.

THE 1918 ACT

In the Revenue Act of 1918 Congress took up for the first time the problem of reorganizations.[1] This Act provided (Section 202(b)):

> "but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange, * * *."

Provision was made for treating as gain the amount of the excess in par or face value of securities received. No attempt was made to define "reorganization", "merger" or "consoljdation".

The Treasury Department thereupon promulgated under this Act Regulations 45. In these Regulations the above section was interpreted in Article 1567 as follows:

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[1]The pertinent provisions of the Revenue Act of 1918 and subsequent Acts, and of the Regulations promulgated thereunder, are quoted in Appendix A.

"In general, where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered. If the stock so received has no nominal or par value the limitation on aggregate par value is inapplicable." (Underscoring ours.)

The transaction now before the Court would come under (c) in the above Regulation. It will be noted that in that case, and in cases (a) and (b), the Treasury Department ruled that a dissolution was necessary.

Thus, the Treasury Department clearly interpreted the 1918 Revenue Act as requiring a dissolution unless there was a statutory merger or consolidation. The statute had not defined the words, and the Treasury Department gave them the foregoing definition.

In the 1920 revised edition of Regulations 45 there was inserted in Article 1567 a provision to the effect that reorganization included a case where stockholders exchanged their stock for stock of a holding corporation, provided that the two corporations were affiliated so as to be required to file consolidated returns, and no mention was made of dissolution. Thus, even under the 1918 Act the Treasury

recognized that there were transactions that should be treated as nontaxable reorganizations, even if one of the corporations was not dissolved.

Obviously, the situation was unsatisfactory and uncertain, and cried aloud for Congressional action.

The 1921 Act

Congress in 1921 took up this problem. In the 1921 Act it is provided in Section 202(c) (2) that no gain or loss shall be recognized,

> "(2) When in the reorganization of one or more corporations a person receives in place of any stock or securities owned by him, stock or securities in a corporation a party to or resulting from such reorganization. The word 'reorganization', as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), recapitalization, or mere change in identity, form, or place of organization of a corporation (however effected); or * * *." (Underscoring ours.)

The Committee on Ways and Means in reporting the Bill to Congress stated with respect to the profit and loss provisions of the 1918 Act:

> "Probably no part of the present income-tax law has been productive of so much uncertainty and litigation or has more seriously interfered with those business readjustments which are peculiarly necessary under existing conditions."

And referred to the proposed changes thus:

> "The preceding amendments, if adopted, will, by removing a source of grave uncertainty, not only permit business to go forward with the readjustments required by existing conditions but will also considerably increase the revenue by preventing taxpayers from taking colorable losses in wash sales and other fictitious exchanges." (H. Rep. No. 350, 67th Cong., 1st Sess., p. 10.)

In the Report of the Senate Committee on Finance, this proposed Section 202(c) was discussed, and it was pointed out that the changes would remove "a source of grave uncertainty", and eliminate "many technical constructions which are economically unsound", and "permit business to go forward with the readjustments required by existing conditions" (S. Rep. No. 275, 67th Cong., 1st Sess., p. 11).

However, it is most important to note one of the differences that arose between the House and the Senate, and what came of it. Out of the settlement of this difference arose the provisions in the Act that are the basis of this controversy. The Senate Committee on Finance first proposed the provision that a reorganization should include the acquisition of "substantially all the stock * * * of another corporation". When the bill reached the floor of the Senate, Senator McCumber moved an amendment to reduce this requirement to a majority of the voting stock and a majority of all other classes. After a sharp debate on the floor of the Senate, the McCumber amendment was adopted.

Pertinent extracts from the debate are quoted in Appendix B to this brief. Some Senators pointed out that this provision would permit the building up of holding companies through nontaxable reorganizations, since one company could acquire a mere majority interest in other corporations, and thus control them. Other Senators argued that that

result was fair and proper, and should be permitted. The majority voted for the McCumber amendment.

The bill then went to conference, and the House accepted this Senate amendment. The report of the Conference Committee states:

> "The Senate amendment adds to this definition the case where one corporation acquires at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation; and the House recedes" (Conf. Rep. No. 486, 67th Cong., 1st Sess., pp. 17 and 18).*

It is thus clear that Congress in the interests of the public welfare, had found it necessary to broaden the reorganization provisions of the 1918 Act and to drop the restriction as to equal par value. It is also clear that the very clause in which we are interested, namely, the acquisition by one corporation of the stock of another, was the subject of considerable debate, and that it went through various changes before it finally reached its enacted form. The requirement that all the stock be acquired was deemed to be too onerous, and Congress ultimately adopted the majority standard—which is not sufficient to bring about dissolution or statutory consolidation or merger under general statutory provisions.

The Regulations under the 1921 Act.

The Treasury Department thereupon promulgated under this new law its Regulations 62 (appr ved by the Sec-

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* It is noteworthy that the Conference Report uses the words "adds to this definition," and makes no mention of the use of a parenthetical clause from which the Treasury Department would now draw so many inferences.

retary of the Treasury on February 15, 1922). These Regulations, in referring to the reorganization section, provide in Article 1566(b) as follows:

> "Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization." (Underscoring ours.)

This Regulation follows closely in form the Regulation under the 1918 Act, and its similarities and differences are apparent and vital. Case (c) has now become case (3). Please note that all reference to dissolution has been omitted. This is likewise true of case (2), formerly case (b). The requirement of dissolution has only been retained in case (1), formerly case (a). In the Regulations under the 1918 Act, dissolution was a requirement in every situation, apart from consolidations or mergers. In the Regulations under the 1921 Act, dissolution is retained only in case (1), where it serves merely to distinguish case (1) from case (2).

The sentence added by the revised edition of the Regulations under the 1918 Act doing away with the provision for dissolution where the corporations were affiliated, dis-

appeared, as it was no longer necessary. Dissolution had ceased to be a requirement where the reorganization took the form of one corporation acquiring stock in another.

The case at bar clearly comes under cases (3) or (6). We have either "the sale of the stock of B to A" or "the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B", and "the sole consideration received by the stockholder is stock or securities of corporations A or B". All of the stock of B (Ferro Alloys Corporation) was acquired by A (Vanadium Corporation), and the sole consideration was the stock of A (Vanadium Corporation) and the bonds of B (Ferro Alloys Corporation).

In the clearest possible language the regulation states that in those situations

> "no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B".

The principal change in the Regulations from the 1918 Act to the 1921 Act was the omission of the requirement of dissolution. That it should have been omitted would seem almost indisputable. The 1921 Act made no reference to that requirement, despite the suggestion contained in the Regulations under the 1918 Act; but further, the 1921 Act in effect excluded the possibility of such a requirement, in view of the action of Congress, after consideration and amendment, in finally including as a reorganization the acquisition of a mere majority of the stock. Not only does the acquisition of a majority of stock not constitute a dissolution, but it is insufficient to bring about a dissolution under general corporation laws, where the requirement is usually two-thirds.

The 1924 Act

In 1924 Congress again took up the revision of the Revenue Act. In the 1921 Act the provisions dealing with the transactions from which no gain or loss should be recognized, appeared as Subdivision (c) of Section 202. In the Revenue Act of 1924, these provisions were taken out of that section and given a section of their own, to wit, Section 203.

Before taking up this new section, the following situation must be noted, which will explain what the Court below referred to when it said:

> "The fact that it (Congress) changed a related part of the statute to remove any doubt as to the validity of a Regulation and at the same time re-enacted the part which had been construed by the Regulation which governs here, shows an adoption of such construction."

In the 1921 Act provision was made that in the case of a reorganization no profit or loss should be recognized to *stockholders* from a reorganization; but nothing was said as to whether any gain or loss would result from such reorganization to the *corporations* themselves. However, it will be noted that in the above quoted Article 1566 of Regulations 62, interpreting the 1921 Act, the Treasury Department stated that no gain or loss should be recognized in the case of the corporations as well as in the case of the stockholders.

This was examined by Congress, the Committees of both Houses commented upon it, and then Congress extended the statute to make it as broad as the Treasury Department's Regulations.

The Report of the Committee on Ways and Means is illuminating. It calls attention to the amendment it is proposing in the law to provide that there shall be no recognition of gain or loss to the corporation in a reorganization, and then proceeds:

> "There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The statute should contain a definite rule on this question.
>
> Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation." (H. Rep. No. 179, 68th Cong., 1st Sess., p. 13.)

The Report of the Senate Committee on Finance, similarly referring to this section, said:

> "There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department on this question is of doubtful legality and a statutory provision is most necessary."

And it thereupon also recommended the extension of the exemption from gain or loss. (S. Rep. No. 398, 68th Cong., 1st Sess., pp. 14 and 15.)

Therefore, we have this situation: Congress examined into the interpretation placed by the Treasury Department's

Regulations on the reorganization section of the 1921 Act. It found that in one respect those Regulations went beyond what the act provided, namely, in extending nonrecognition also to the corporation. Thereupon it re-enacted the reorganization section in substantially the same language, and added a new subsection, numbered (3), to broaden the statute to accord with the Regulations.

It should be noted that the only substantial change that Congress made in the definition of reorganization was to enlarge it. It had already included (1) the acquisition of a majority of stock, and (2) the acquisition of substantially all of the assets; and it now introduces a further category, namely, the transfer by a corporation of only part of its assets in exchange for securities, if it or its stockholders control the transferee.

In 1924 Congress thus reviewed its earlier statute after a lapse of three years. It had before it the interpretation of the Treasury Department set forth in the Regulations dealing with the much-mooted reorganization section. This Regulation had dropped the requirement for dissolution that had been contained in the preceding Regulation. Congress found that this Regulation went further than the statute in the one respect above noted. It thereupon extended the statute to cover this point in the Regulations. Its further action was to broaden even further the definition of the word "reorganization" by adding another class of transaction.

Here we do not have to rely upon a presumption that when Congress reenacts a statute that has received executive construction, it approves such construction and thereby adopts it. We go even beyond that view, for Congress certainly in 1924 examined and then affirmatively approved the Treasury Department's interpretation of the reorganization section of the 1921 Act. When it reenacted the words

of the statute, without substantial change, and added a provision to bring the statute into accord with the Regulations on the point where it found that the Regulations had gone beyond the statute, *it assuredly evidenced its acceptance of the balance of the Regulations as being in accord with the statute.*

After the adoption of the 1924 Act, the Treasury Department promulgated its Regulations thereunder known as Regulations 65. Article 1574 deals with reorganizations, and is substantially the same as the Regulations under the 1921 Act except that it has now been expanded to include the transfer by one corporation of all or part of its assets to another corporation, with retention of control.

The 1926 Act

Two years later Congress again took up the revision of the Revenue Law, and although it was amended in certain respects, the reorganization definition was again reenacted, without substantial change. (See Section 203 (h) (1) of the Revenue Act of 1926.)

The Treasury Department promulgated its Regulations thereunder, being Regulations 69, and again adopted this interpretation of the reorganization definition, without substantial change. (See Article 1574 of Regulations 69.)

The 1928 Act

In 1928 Congress made a rather extensive revision and readjustment in the Revenue Law. The reorganization definition now appears in Section 112, but the old language was reenacted, without substantial change. (See Subdivision (i) of Section 112 of the Revenue Act of 1928.)

The Treasury Department promulgated Regulations 74 under this Act. The definition of reorganizations is cov-

ered in Article 574, and, although the wording is somewhat changed and the section is a little more elaborate, still it is the same in substance in omitting the requirements of dissolution. For the first time a change does appear, but it does not affect the fundamental principle involved. The Regulations now provide that the stockholders of X who transfer their stock to Y shall receive only stock or securities of Y. This change would, at most, bring into question the taxability of the bonds of the Ferro Alloys Corporation received by the stockholders, and would not affect the balance of the transaction, as is pointed out by Article 575 of the Regulations[1]. It must also be noted that this change did not take place until four years after the transaction now before this Court. But even though the Treasury Department made this change in 1928, it still continued its interpretation that did not require dissolution.

The 1932 Act

Four years later Congress again took up the Revenue Act and made certain changes in it, but reenacted the definition of "reorganization" without change. (See Subdivision (i) of Section 112 of the Revenue Act of 1932.)

The Treasury Department promulgated thereunder its Regulations 77. Article 574, which deals with reorganizations, is substantially the same as the corresponding article in the preceding Regulations.

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[1] It would seem that Ferro Alloys was a "party to the reorganization", as that term is defined in Section 203(h)(2) of the Revenue Act of 1924, so that its bonds would be the securities "in such corporation or in another corporation a party to the reorganization" within the meaning of Section 203(b)(2) of the Revenue Act of 1924. The Court below must have so concluded, because it denied a motion for reargument, based on the claim that its decision in this case was inconsistent with its decision in *Worcester Salt Co.* v. *Com.*, 75 F. (2d) 251.

The first intimation that dissolution was necessary for a nontaxable reorganization came in June 1933, in the decision of the Board of Tax Appeals in *Minnesota Tea Company* v. *Commissioner,* 28 B. T. A. 591. It would appear from the record that the point was raised by the Board *sua sponte.*

No reference was made to the legislative and administrative history of the Act. The decision of the Board was reversed by the Circuit Court of Appeals for the Eighth Circuit (76 Fed. (2d) 797), and the case is now pending in this Court on *certiorari* (Docket No. 174). The Board's decision in the cases at bar followed shortly after its decision in the *Minnesota Tea Co.* case.

The 1934 Act

When Congress took up the revision of the Revenue Act in the spring of 1934, the decisions of the Board of Tax Appeals in the *Minnesota Tea Company* case, in the case at bar and in other cases had sharply raised the question of dissolution as a requirement for reorganization. Also, various other occurrences had sharply focused attention upon the reorganization sections of the Revenue Act.

Despite this, Congress, although it made certain significant changes in the reorganization section, still refrained from requiring dissolution in its definition of "reorganization". Also, it still included therein, the acquisition by one corporation of less than all of the stock of another corporation. Thus, it not only failed to mention dissolution, although the question had been squarely raised, but it also continued to include in the definition of "reorganization" a stock acquisition which did not necessitate, or even involve, dissolution. *It even dropped the use of the parenthetical clause,* which action directly confirms the Treasury Department's continuous past construction and opposes its present position.

The repeated reenactment by Congress of a Statute, after a continuous administrative construction, is the adoption by Congress of that construction, giving it the force of law.

Our situation is that Congress adopted the reorganization section in 1921. The Treasury Department promulgated its construction, which did not require dissolution in a case such as that now before the Court, thereby changing the Regulations that had existed under the 1918 Act. Congress four times thereafter, running over a period of eleven years, enacted revenue laws and kept this definition substantially unchanged; and the Treasury Department has, during all these years, promulgated its Regulations that have consistently maintained the same interpretation announced in 1921, namely, that dissolution is not necessary. Even in 1934, Congress in its fifth reconsideration of the definition of "reorganization", still did not require dissolution in a case such as that now before the court.

As early as the case of *Edwards* v. *Darby*, 12 Wheat. 206, the Supreme Court began to establish its rule that great weight would be given to a consistent construction of a statute by department officials who are called upon by law to act under the statute and to carry it into effect. (See *National Lead Company* v. *U. S.*, 252 U. S. 140; *Logan* v. *Davis*, 233 U. S. 613).

This rule, stated and followed in innumerable cases, would in itself be sufficient to be determinative of the present case; but where in addition to consistent administrative construction *there is also reenactment by Congress*, this Court has laid down an even stronger rule.

U. S. v. *Cerecedo Hermanos y Compañia*, 209 U. S. 337, 339:

> "We have said that when the meaning of a statute is doubtful great weight should be given to the construction placed upon it by the department charged with its execution. (Citing cases.) And we have decided that the reënactment by Congress, without change, of a statute, which had previously received long continued executive construction, is an adoption by Congress of such construction."

National Lead Company v. *U. S.*, 252 U. S. 140, 146:

> "The reënacting of the drawback provision four times, without substantial change, while this method of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute." (Citing cases.)

U. S. v. *G. Falk & Bro.*, 204 U. S. 143, 152:

> "This, then, is our view: the Attorney General having construed the proviso of section 50 of the act of 1890 as not restricted to the matter which immediately preceded it, but as of general application, and this construction having been followed by the executive officers charged with the administration of the law, Congress adopted the construction by the enactment of section 33 of the act of 1897 * * *."

U. S. Dakota-Montana Oil Company, 288 U. S. 459, 466, 467:

> "Thus the Acts of 1918, 1921 and 1924 were consistently construed by the regulations to permit a depletion, but not a depreciation, allowance for the

> costs of development work and drilling, which were treated for this purpose either as a part of the cost or an addition to the discovery value of the oil in the ground. The administrative construction must be deemed to have received legislative approval by the reënactment of the statutory provision without material change." (Citing cases.)

Numerous decisions of this Court to the same effect may be cited, but we pass to the 1934 Term for its most recent statements and applications of the principle:

In *Old Mission Portland Cement Company* v. *Helvering*, 293 U. S. 289 (December 3, 1934), Mr. Justice Stone phrased it thus:

> "These provisions were retained without substantial change in the regulations promulgated under the 1924, 1926 and 1928 Acts. As § 234(a) (1) to which they pertain has been reënacted in several Revenue Acts, the regulation now has the force of law."

In *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172 (November 5, 1934), Mr. Justice Cardozo explained the principle thus:

> "Successive revenue statutes have been enacted without substantial change in the applicable sections. Congress seemingly has been satisfied with the Decisions of the Treasury and with the interpretation of its own meaning implicit in them (citing cases). From this administrative history the inference is compelling that a second return * * * does not toll a limitation which has once begun to run."

See also *Helvering* v. *Bliss*, 293 U. S. 144 (November 5, 1934), and *Helvering* v. *Union Pacific Railroad*, 293 U. S. 282 (December 3, 1934). In both these cases the

Treasury Department had by its regulations construed the statute, Congress had reënacted it, and then the Treasury Department sought to reverse its interpretation; and in both instances this attempt of the Treasury Department was unsuccessful.

Finally, and most recently, in *Hartley, Executor,* v. *Commissioner* (decided April 29, 1935), this Court held as follows:

> "The reënactment of the pertinent provisions of Section 202 of the Revenue Act of 1921 and the Acts of 1924 and 1926, without material change, was a Congressional recognition and approval of the interpretation of the section by the Treasury Regulations *which gave them the force of law.*" (Italics ours.)

As we stated at the outset, it would be almost impossible to find a clearer case for the application of this principle than the case at bar.

The Treasury Department's Regulation was not inconsistent with the statute, but on the contrary was the proper interpretation of it.

Clearly, under the Regulations, re-promulgated four times, the acquisition by Corporation A of the requisite amount of stock of Corporation B in exchange for common stock of Corporation A constitutes a nontaxable reorganization regardless of whether Corporation B is dissolved; but now the Commissioner asserts that this Regulation must be disregarded because it is not consistent with the statute.

The complete and obvious answer is that suggested by the Court below, namely, that if the construction was wrong, Congress had four opportunities to change it, and

failed to do so. This argument becomes irresistible when we recall the examination made by Congress in 1924 into the Treasury Department's Regulations dealing with reorganization.

Furthermore, this interpretation is squarely in accord with the language of the Act; and it similarly accords with the purpose, as becomes evident when we recall the changes made in this section before it reached its final form, the McCumber amendment on the floor of the Senate and the debate thereon (Appendix B). Congress said that "reorganization" should include the acquisition of a majority of the stock of a corporation; it did not add any requirement that there should be a dissolution, which it could readily have done in that Act or in any of the four subsequent reenactments of the statute, if Congress had so intended. Also, the ownership of a majority of the stock of a corporation is generally not sufficient to bring about dissolution (or consolidation or merger). Therefore, it would have been meaningless for Congress to have provided that the acquisition of a mere majority of a corporation's stock constituted a reorganization, if it meant that dissolution was a necessary concomitant, for a mere majority is generally insufficient to bring about dissolution.

Although there is no question of inconsistency in this case, it may be noted that this Court in *United States* v. *Alabama Great Southern Railroad Company*, 142 U. S. 615 (p. 621), while doubting whether the administrative construction was consistent with the wording of the statute, nevertheless upheld it where it had been consistently applied for nine years, even though there had been no statutory reenactment.

The Commissioner appears to rest his argument upon the language of this Court in *Pinellas Ice & Cold Storage*

Co. v. *Commissioner,* 287 U. S. 462, but the argument is based upon an obvious misconstruction of this Court's opinion.

This Court, although affirming the decision of the lower Court, took occasion to state that it disagreed with the narrow construction of the reorganization section announced by the lower Court, and that it preferred the views of the Circuit Court of Appeals for the Second Circuit in *Cortland Specialty Co.* v. *Commissioner,* 60 Fed. (2d) 937. It will be remembered that it was this latter Court that decided the cases now at bar, and in so doing it expressly purported to be acting in no way inconsistently with its decision in the *Cortland Specialty* case or the decision of this Court in the *Pinellas* case.

In the *Pinellas* case the consideration given for assets consisted of cash and some short-term notes. Such a transaction was held by this Court to partake of the nature of a sale rather than a reorganization; and we respectfully state our belief that the pith of this Court's opinion is to be found in the following language near its conclusion:

> "But the mere purchase for money of the assets of one Company by another is beyond the evident purpose of the provision, and has no real semblance to a merger or consolidation. Certainly, we think that to be within the exemption the seller must acquire an interest in the affairs of the purchasing company more definite than that incident to ownership of its short-term purchase money notes."

The distinction is made between transactions partaking of the nature of a sale, as distinguished from reorganizations; and the criterion of this distinction is the nature of the consideration. Where the consideration is cash or its

substantial equivalent, then the transaction is really a sale even if the other statutory conditions are met. To make it a reorganization, the consideration received by the seller must give him a definite interest in the affairs of the purchasing company.

In the case at bar, common stock of the purchaser was given to the seller; and certainly the seller thereby acquired the most definite interest in the affairs of the purchasing company.

This explains the alleged diversity between the different decisions of the lower Courts upon which the Commissioner relied in seeking this writ of certiorari.

In *Prairie Oil & Gas Co.* v. *Motter*, 66 Fed. (2d) 309, the Court held that a sale for cash was not a reorganization.

In *John A. Nelson Co.* v. *Commissioner*, 75 Fed. (2d) 696, the consideration was cash and nonvoting preferred stock; and there the Court held there was no reorganization (Docket 61).

In *Worcester Salt Co.* v. *Commissioner*, 75 Fed. (2d) 251, the consideration was bonds, and that the Court held was insufficient to make it a reorganization.

However, in *Minnesota Tea Company* v. *Commissioner*, 76 Fed. (2d) 797, the consideration was common stock and cash, and the Court held that it was a nontaxable reorganization.

These cases are all distinguishable by applying the yardstick of what constitutes a sufficiently definite interest on the part of the seller in the affairs of the purchasing company. Obviously, common stock must be sufficient; and that is the case at bar and the *Minnesota Tea Company* case. The decision of what stock or securities other than

common stock are sufficient, will determine the correctness of the other cases.

The case of *G. & K. Manufacturing Co.* v. *Commissioner*, 76 Fed. (2d) 454 appears to have gone off on the question as to whether the taxpayer showed "with certainty that all or even substantially all of its assets were transferred", and therefore would not be in point (Docket 187).

The final case cited by the Commissioner, namely, *Von Weise* v. *Commissioner*, 69 Fed. (2d) 439, is obviously not in point, as it clearly does not come within the statute because the purchaser acquired the requisite amount of common stock but not a majority of the nonvoting preferred stock.

Accordingly, there is no substance in the Commissioners' claim of inconsistency between the Regulation and the statute; or of inconsistency between the Regulation and the decision of this Court in the *Pinellas* case; or of inconsistency between this case and the *Minnesota Tea Company* case, on the one hand, as against the other lower Court Federal cases cited by the Commissioner.

Conclusion

It is respectfully submitted that the judgment below should be affirmed.

EDWARD H. GREEN,
Attorney for Western Power Corporation, Amicus Curiae.

SULLIVAN & CROMWELL
Of Counsel.

APPENDIX A

Revenue Act of 1918

LAW—SECTION 202(b)

"* * * but when in connection with the reorganization, merger, or consolidation of a corporation a person receives in place of stock or securities owned by him new stock or securities of no greater aggregate par or face value, no gain or loss shall be deemed to occur from the exchange * * *."

REGULATIONS 45

Article 1567

"In general, where two (or more) corporations unite their properties by either (a) the dissolution of corporation B and the sale of its assets to corporation A, or (b) the sale of its property by B to A and the dissolution of B, or (c) the sale of the stock of B to A and the dissolution of B, or (d) the merger of B into A, or (e) the consolidation of the corporations, no taxable income is received from the transaction by A or B or the stockholders of either, provided the sole consideration received by B and its stockholders in (a), (b), (c), and (d) is stock or securities of A, and by A and B and their stockholders in (e) is stock or securities of the consolidated corporation, in any case of no greater aggregate par or face value than the old stock and securities surrendered."

(Added in the revised 1920 edition)

"The term 'reorganization,' as used in section 202 of the statute, includes cases of corporate readjustment where stockholders exchange their stock for the stock of a holding corporation, provided the holding corporation and the orig-

inal corporation, in which it holds stock, are so closely related that the two corporations are affiliated as defined in section 240 (b) of the statute and article 633, and are thus required to file consolidated returns."

Revenue Act of 1921

LAW—SECTION 202(c)

"The word 'reorganization,' as used in this paragraph, includes a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation), * * *."

REGULATIONS 62

Article 1566 (b)

"* * * Where two or more corporations unite their properties, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, no taxable income is received from the transaction by A or B or by the stockholders of either corporation A or corporation B, provided the sole consideration received by the stockholders is stock or securities of corporations A or B or any corporation a party to or resulting from the reorganization."

Revenue Act of 1924

LAW—SECTION 203 (h) (1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 65

Article 1574

"* * * If two or more corporations reorganize, for example, by either (1) the dissolution of corporation B and the sale of its assets to corporation A, or (2) the sale of its property by B to A, or (3) the sale of the stock of B to A, or (4) the merger of B into A, or (5) the consolidation of A and B, or (6) the acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or (7) the transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B, then no taxable income is received from the transaction by corporation A or B if the sole consideration for the transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B."

Revenue Act of 1926

LAW—SECTION 203(h)(1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 69

Article 1574

"* * * If two or more corporations reorganize, for example, by—'

(1) The dissolution of corporation B and the sale of its assets to corporation A,

(2) The sale of its property by B to A,

(3) The sale of the stock of B to A,

(4) The merger of B into A,

(5) The consolidation of A and B,

(6) The acquisition by A of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of B or of substantially all of the properties of B, or

(7) The transfer by A of all or a part of its assets to B where immediately after the transfer A or its shareholders are in control of B,

then no taxable income is received from the transaction by corporation A or B if the sole consideration for the

transfer of the assets is stock or securities of corporation A or B; and no taxable income is received from the transaction by the shareholders of either corporation A or corporation B if the sole consideration received by the shareholders is stock or securities of corporation A or B."

Revenue Act of 1928

LAW—SECTION 112(i)(1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 74

Article 574

"* * * If two or more corporations reorganize, for example, by—

(1) The merger of the X Corporation into the Y Corporation,

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) The acquisition by the Y Corporation of a majority of the voting stock and a majority of the total number of shares of all other classes of stock of the X Corporation or of substantially all of the properties of the X Corporation, or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after

the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock or securities of the Y Corporation; and no taxable income is received from the transaction by the shareholders of either the X Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation."

Revenue Act of 1932

LAW—SECTION 112(i)(1)

"The term 'reorganization' means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), * * *."

REGULATIONS 77

Article 574

"* * * If two or more corporations reorganize, for example, by—

(1) The merger of the X Corporation into the Y Corporation,

(2) The consolidation of the X Corporation and the Z Corporation into the Y Corporation, a new corporation,

(3) The acquisition by the Y Corporation of a majority of the voting stock and a majority of the total number

of shares of all other classes of stock of the X Corporation or of substantially all of the properties of the X Corporation, or

(4) The transfer by the X Corporation of a part of its assets to the Y Corporation where immediately after the transfer the X Corporation or its shareholders or both are in control of the Y Corporation—

then no taxable income is received from the transaction by the X Corporation or the Z Corporation if the sole consideration received by the corporations is stock or securities of the Y Corporation; and no taxable income is received from the transaction by the shareholders of either the X Corporation or the Z Corporation if the sole consideration received by the shareholders is stock or securities of the Y Corporation."

Revenue Act of 1934

LAW—SECTION 112(g)(1)

"The term 'reorganization' means (A) a statutory merger or consolidation, or (B) the acquisition by one corporation in exchange solely for all or a part of its voting stock: of at least 80 per centum of the voting stock and at least 80 per centum of the total number of shares of all other classes of stock of another corporation; or of substantially all the properties of another corporation, * * *"

APPENDIX B.

Excerpts from Congressional Record, Vol. 61, parts 6-7, 67th Congress, 1st Session—Debate on McCumber amendment to definition of reorganization in Revenue Bill.

[p. 6549] MR. MCCUMBER. Mr. President, after the language in lines 8 and 9 on page 12, proposed to be stricken out, in lieu of the matter proposed to be inserted by the committee amendment, on lines 9, 10, and 11, it is proposed to amend the amendment by inserting the following:

> merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or of substantially all the properties of another corporation.

That is amendment numbered 2 on the print which has been circulated, and which are called, I think, by the euphonious name of "bloc amendments."

MR. JONES of New Mexico. May I ask the chairman of the committee to state why the change was suggested? There must be some specific reason for it, and not having had the advantage of knowing what the reason was I ask the Senator to state the purpose of making the change.

* * * * * * * * *

[p. 6550] MR. MCCUMBER * * *

Now, it so happens that in many instances, while you might have substantially or nearly all of the stock, years might pass before all of the stock of the absorbed corporation would be brought in, and yet the reorganization can take effect even though every share of the stock may not be accounted for. This is to protect the person who

receives the stock from being charged with a profit where he has not made a profit upon the stock which is received, even though there may be some outstanding stock.

* * * * * * * * *

[p. 6562] MR. JONES of New Mexico. I am sure the Senator [Mr. Penrose] does not think so now, but here is the effect of the amendment: Suppose that there were two individuals, each of whom owned a majority of the stock of separate corporations. Suppose, for instance, that there are two steel manufacturing concerns, and I own a majority of stock in one and the Senator to my right, the Senator from Rhode Island [Mr. Gerry], owns a majority of stock in another. We propose to consolidate the management of those two concerns. We have a right under this provision to organize a new corporation, and I put in my stock for any number of shares which I may see fit to have issued for them and a like number of shares are assigned, of course, to the Senator from Rhode Island, who owns a majority of the stock in another concern. It is a specific plan, adapted primarily to permit the consolidation of the control of corporations and putting water into their capitalization. If it means anything, that is just what it means. You can organize a holding company for the purpose of taking over a majority of the stock—not the property, as suggested by the Senator from North Dakota, simply because they can not get in a few outstanding shares of stock, because we all know that in order to transfer the property you have to get the consent of all the shareholders in the case of the ordinary corporation; so it is not for the purpose of transferring the property at all. It is simply for the purpose of transferring the control of the stock of the corporation, and it is intended primarily to permit that kind of thing to be done under this sanction of law, and that there shall be no gain or loss considered in the transaction.

If I am able to understand this amendment, that is just what it means. It means, as I say, that you organize a holding company and then every person who owns a majority of the stock of another concern can put into the new holding company simply his majority of that stock, and then the holding company issues stock in any amount in payment for the majority stock of these various subsidiary corporations. It simply means, as I said in the first place, a very convenient device for the purpose of pumping water into the capitalization of corporations, and that is the purpose for which it would be used.

* * * * * * * * * *

MR. WATSON of Indiana. I think the all-sufficient answer to that is simply this proposition: If the Senator owns $100,000 worth of stock in one corporation, and under the provisions of this amendment he transfers those shares of stock to another corporation and receives shares of stock of the new corporation to the value of $1,000,000, he will carry that $1,000,000 worth of stock at the value of the $100,000 worth of stock. He must carry it at that old value until he sells it, and when he sells it he accounts by way of taxation for the gain which he makes. That is all that this amendment provides. It is purely a paper affair. It is the exchange of the stock of different corporations for business purposes; and at a time when so much reorganization is going on in the business world, it is thought by all those interested in the upbuilding of the industries of the country at this time that this is a very helpful provision.

I call the Senator's attention to the further fact that it prevents the registration of losses quite as much as the registration of gains, and at this time, when many of these transfers are being made, losses will occur more frequently than gains. Therefore, on the whole, this seems

to be amply safeguarded, for if the Senator will read the language on page 13 in this very section, on the subject of gains and losses, he will see it is provided that—

> Where property is exchanged for other property and no gain or loss is recognized under the provisions of subdivision (c), the property received shall, for the purposes of this section—

That is, for the purposes of ascertaining either gain or loss—

> be treated as taking the place of the property exchanged therefor.

* * * * * * * * *

[p. 6565] MR. JONES * * * while the amendment refers to what is called a reorganization, when we come to the definition of the word as stated in the bill itself we find it does not necessarily mean a reorganization, it does not necessarily mean a merger or a consolidation, but what it does mean is that persons controlling a majority of the stock may meet and organize a new concern which will own nothing but a majority of the stock, and in payment for that majority of the stock issue the stock of the new concern in any amount which they may choose.

MR. REED. Free from tax.

MR. JONES of New Mexico. Yes; free from tax. I will state the effect of it, and I can not illustrate it any better than in the organization of the United States Steel Corporation today. When that concern was organized it did not take over the property of the various other steel concerns. I think in most cases it took over practically all the stock, but under this arrangement it would not need to do that. It could simply take over a majority of the stock, control the stock, freeze out the minority stock-

holders, control the new aggregation and issue new stock in an unlimited amount in payment for the stocks of the subsidiary corporation, and pay no tax on it, although the next day the market value might be very much greater than the market value of the aggregate securities of the subsidiary corporations.

* * * * * * * * * *

MR. MCCUMBER. I think the Senator from New Mexico has made this proposition far more complex than it really is. Let us see if we can not simplify it by a concrete illustration which I think is pertinent.

We will say that one corporation owns 160 acres of land worth $100 an acre, or a total of $16,000. Another corporation owns 100 acres of land worth exactly the same amount per acre; that is, $100 an acre, or a total of $10,000. Another corporation owns 40 acres of land worth $100 an acre, or a total of $4,000. The interests of the three corporations amount in the aggregate to $30,000. Now, the corporations unite and put all of their stock into a new corporation, issuing $30,000 worth of stock to the owners of the land in the proportion of 16, 10, and 4. The Senator from New Mexico would not say that they had either gained or lost by that transaction; they would have exactly the same interest which they previously had and the Senator would not allow the Treasury Department to say to those stockholders, "You have made a gain even though you have not sold a single acre of the land."

Now, let us carry the illustration a step further and say that the stockholders of the corporation owning the 40 acres will not come into the consolidation, but the other two corporations purchase 51 per cent of the stock of the corporation which owns the 40 acres. Then they have fifty-one one-hundredths of the stock of the corporation owning the

40 acres; that is their interest in that 40 acres of land. All this amendment does is to apply the same rule to those who have purchased that stock, so that they shall not be held to have gained or lost by the issuance of the new stock, because the new stock, even though it represents only fifty-one one-hundredths of the 40 acres, nevertheless exactly measures what they have received, and there is no gain and no loss in the transaction.

* * * * * * * * *

[p. 6568] MR. REED. * * * This bill proposes to make that sort of a transaction all the easier, and to say that the law, instead of applying, as it did originally, to an actual reorganization of the same corporation, in which event a man simply took down a different share of stock for his original share, and it shall now apply if a majority of the stock is carried into the consolidation.

* * * * * * * * *

[p. 6569] So MR. MCCUMBER'S amendment to the amendment of the committee was agreed to.